review of the Court of Appeal's decision with respect to the applicability of the doctrine of *in pari delicto* in cases where a Chapter 7 trustee asserts assigned causes of action against non-debtor third parties that allegedly participated in an illegal and fraudulent scheme with the bankrupt debtors.

Factual Background. The allegations in this case describe a real estate "flipping scheme" in which Michael Bogdan ("Bogdan") and Inner City Management, LLC ("ICM") (collectively, the "Debtors") purchased dilapidated houses in Baltimore City, Maryland, and then re-sold them for prices that far exceeded both the purchase price paid by the Debtors and the actual fair market value of the houses. (App. at 4a-5a). The Debtors allegedly carried out the scheme with the cooperation of real estate appraisers who supplied falsely inflated appraisals relied upon by lenders in financing the purchase of the houses from the Debtors. *Id.*

The alleged conspiracy also included settlement agents who, in violation of the lenders' instructions and expectations, distributed substantial kickbacks to the Debtors and the buyers. *Id.* Subsequently the buyers, whose ability to pay the loans was also overstated, defaulted on their loans, leaving the lenders to discover that their collateral—the houses—left them significantly undersecured. *Id.* The Debtors' illegal enterprise was halted when Bogdan was charged in the United States District Court for the District of Maryland with, *inter alia*, conspiracy to commit mail and wire fraud and making false statements under section 371 of Title 18 of the United States Code. *Id.* Bogdan entered a guilty plea to those charges on December 19, 2000. *Id.*

On August 25, 2000, Bogdan and ICM filed voluntary petitions for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court"). (App. at 4a). Sean C.

Logan was appointed as the Chapter 7 trustee for the Debtors' bankruptcy estates (the "Trustee"). *Id.*

On June 25, 2002, the Trustee filed a ten-count Complaint (the "Complaint") against forty-six (46) defendants, including the Petitioners, Stewart Title Guaranty Company ("Stewart"), JKV Real Estate Services ("JKV"), John K. Voyatzis ("Mr. Voyatzis"), and Fidelity National Title Insurance Company ("Fidelity") (collectively, the "Petitioners"), as well as numerous other appraisers, mortgage brokers, title agents, and title insurance companies (the "First Adversary Proceeding"). (App. at 24a; 33a-34a). The causes of action asserted by the Trustee in the Complaint stem from the Debtors' illegal "flipping scheme" and allege that the named defendants, among other things, conspired with the Debtors[1] to defraud the mortgage lenders through the flipping scheme. (App. at 24a; 33a-34a). Specifically, the Complaint purported to state causes of action against Stewart, JKV, Mr. Voyatzis, and Fidelity for civil conspiracy, intentional misrepresentation, fraudulent concealment, negligence, and breach of contract. (App. at 24a; 33a-34a). The Trustee alleged in the Complaint that he was asserting these causes of action on behalf of the Debtors' bankruptcy estates[2] based on the unconditional assignment of the causes of action by certain of the mortgage lenders that were allegedly defrauded by the

---

[1] The Trustee conceded in the proceedings below that the Debtors were the masterminds of the alleged conspiracy and that the Debtors are culpable in the wrongdoing. (App. at 4a –5a).

[2] The Trustee asserted that because the causes of action were unconditionally assigned to the Debtors' bankruptcy estates by certain mortgage lenders, the causes of action were now property of the Debtors' bankruptcy estates on the basis that they were property acquired by the estates after the filing of the bankruptcy petitions. *See* 11 U.S.C. § 541(a)(7).

Debtors.[3] (App. at 5a). As relief, the Trustee demanded judgment for compensatory damages of $1,000,000.00 and punitive damages of $500,000.00. (App. at 5a-6a).

The defendants, including Petitioners, moved to dismiss the First Adversary Proceeding on the grounds that, *inter alia*: (1) the Complaint improperly joined all forty-six (46) defendants in one lawsuit based upon separate causes of action that arose out of different facts; (2) the Trustee failed to plead fraud with particularity; and (3) the Trustee lacked standing to pursue the claims asserted therein. (App. at 24a; 33a). The Bankruptcy Court granted the motions to dismiss, holding that the Trustee improperly joined all forty-six (46) defendants in one action and had failed to plead fraud with sufficient particularity. (App. at 24a; 33a). The Bankruptcy Court, however, granted the Trustee leave to file separate complaints against the forty-six defendants within sixty (60) days. (App. at 24a; 33a-34a).

Subsequently, on January 17, 2003, the Trustee filed five Amended Complaints, including an Amended Complaint (the "Amended Complaint") against the Petitioners in Adversary Proceeding 03-5070 (the "Adversary Proceeding"). (App. at 24a; 34a). The causes of action asserted by the Trustee in the Amended Complaint were substantially similar to the causes of action asserted in the Complaint and First Adversary Proceeding.[4] The Petitioners, as well as the defendants in the

---

[3] The Trustee did not attach the purported Assignments to the Amended Complaint and they were not part of the record on appeal in the Court of Appeals. (App. at 5a, n.1).

[4] As in the Complaint, the Amended Complaint purported to state causes of action against the Petitioners for civil conspiracy, intentional misrepresentation, fraudulent concealment, negligence, and breach of contract. (App. at 5a).

four related adversary proceedings, filed Motions to Dismiss the Amended Complaints. (App. at 33a). In the Motions to Dismiss, the Petitioners asserted similar arguments in support of dismissal, including, *inter alia,* that pursuant to this Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), the Trustee lacked standing to assert the mortgage lenders' claims notwithstanding the alleged unconditional assignments from certain of the mortgage lenders, and that the Trustee, standing in the shoes of the Debtors, was barred under the doctrine of *in pari delicto* from asserting the causes of action because the Debtors' were complicit in the wrongdoing.

Lower Court Proceedings. The Bankruptcy Court, assuming, *arguendo*, that: (1) the assignments existed; (2) the purported assignments were valid under Maryland law; and (3) the allegations in the Amended Complaint were true, held that the Trustee lacked standing to pursue the claims of individual creditors against non-debtor third parties. (App. at 38a). The Bankruptcy Court further held that the Trustee was barred from asserting such claims by reason of the Debtors' complicity under the doctrine of *in pari delicto*. (App. at 37a). Specifically, the Bankruptcy Court stated:

> In the instant complaints for damages to creditors caused by the fraudulent conduct of the debtor and the entities under his control, the trustee lacks standing to sue the defendants for injuries they caused in concert with the debtor. The cause of action belongs exclusively to the injured creditors of the bankruptcy estate and not to the debtor's estate, because absent the bankruptcy case, the debtor had no standing to sue the defendants. Because the instant suit is not premised upon injury to the estate, the trustee is not the proper plaintiff to bring suit. *National City Bank*

> *of Minneapolis v. Lapides (In re Transcolor)*, 296 B.R. 343, 367 (Bankr. D. Md. 2003).
>
> This result is not altered by the assignment to the trustee of specific claims against the debtors by various mortgage lenders and/or purchasers of mortgages who were injured by the debtors' fraudulent conduct. The trustee has no derivative standing to sue debtors based on the claims of individual creditors, whether by assignment or otherwise. ***To grant such standing not specifically authorized by the Bankruptcy Code would unlawfully expand the traditional powers of bankruptcy trustees and defeat the statutory scheme created by Congress.***

(App. at 37a- 38a) (emphasis added). The Bankruptcy Court did not reach the Petitioners remaining arguments.

The Trustee subsequently filed a timely Notice of Appeal to the United States District Court for the District of Maryland (the "District Court"). On May 4, 2004, the District Court issued a Memorandum Opinion affirming the Bankruptcy Court's decision on grounds substantially similar to those relied on by the Bankruptcy Court. Specifically, the District Court, relying in large part on this Court's decision in *Caplin,* held that "the Trustee lacks standing to pursue the lenders' claims against the appellees notwithstanding the formal assignment of the claims to the Trustee." (App. at 29a). On May 14, 2004, the Trustee noted his appeal to the Court of Appeals.

In a published opinion issued on July 6, 2005, a divided three-judge panel of the Court of Appeals reversed the District Court's decision. The majority, Judge Shedd and Judge Floyd (United States District Judge for the District of South Carolina, sitting by designation) concluded that the Trustee had standing and that the Trustee's claims were not

barred by the doctrine of *in pari delicto* (the "Panel Decision"). Judge King wrote a separate opinion in which he reluctantly concurred with the majority's conclusion that the Trustee had standing to bring the action, but dissented from the majority's conclusion that the Trustee's claims were not barred by the doctrine of *in pari delicto* (the "Dissenting Opinion") (the Panel Decision and Dissenting Opinion are collectively referred to as the "Decision"). (App. at 16a-22a).

Addressing the standing issue first, the Panel Decision found that the alleged unconditional assignments from the mortgage lenders distinguished the present case from this Court's decision in *Caplin*, and the Ninth Circuit's decision in *Williams v. California 1st Bank (In re Chacklan Enters., Inc.)*, 859 F.2d 664 (9th Cir. 1988), and reversed the lower court decisions be reversed. (App. at 4a). The Dissenting Opinion, expressing reservations about the validity of the assignments under Maryland law, concurred with the Panel Decision with respect to the standing issue. (App. at 20a).

The Panel Decision further concluded that the doctrine of *in pari delicto* had no application because the Trustee, acting on behalf of the estates as the unconditional assignee of the mortgage lenders, stepped into the shoes of the mortgage lenders and the mortgage lenders would not have been subject to the defense. (App. at 13a- 14a). The Dissenting Opinion argued that the doctrine of *in pari delicto* precluded the suit by the Trustee because the cases relied upon by the majority were inapposite, and because a "'court may exercise 'the [furthest] breadth of its discretion' in determining its applicability.'"[5] (App. at 21a) (citing *Brown & Sturm v.*

---

[5] Judge King disagreed with the Panel Decision that the "trustee, as assignee of claims, is *only* subject to defenses which the defendants could have raised against the mortgage lenders." (App. at 20a). He also found that the decisions relied upon by the majority "do not support the

Frederick Road Ltd. P'ship, 768 A.2d 62, 89 (Md. Ct. Spec. App. 2001)). The Dissenting Opinion concluded that the Bankruptcy Court and the District Court had properly exercised this discretion. (App. at 21a- 22a).

REASONS FOR GRANTING THE PETITION

The Court of Appeals' Decision is in direct contradiction with the controlling precedent of this Court with respect to the role and standing of a Chapter 7 trustee in bankruptcy. The Decision has also created a split between the Fourth Circuit and other federal circuit courts. The Decision raises important federal issues because, left undisturbed, it establishes a precedent for the significant expansion of the role of a Chapter 7 trustee beyond that envisioned by Congress in enacting the Bankruptcy Code. Finally, in insulating the trustee from the *in pari delicto* defense, the Court of Appeals has fundamentally altered the status of trustees that was contemplated by Congress in enacting the Bankruptcy Code.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT IN *CAPLIN V. MARINE MIDLAND GRACE TRUST CO. OF NEW YORK* AND *SEGAL V. ROCHELLE.*

The Decision of the Court of Appeals is in direct conflict with *Caplin,* in which this Court ruled that a trustee in bankruptcy lacks standing to assert claims of misconduct against non-debtor third parties on behalf of a specific class of individual creditors. 406 U.S. 416 (1972). The debtor in *Caplin*, Webb & Knapp, Inc. ("Webb & Knapp"), was engaged in real estate activities throughout the United States and Canada. *Id.* at 417. Prior to bankruptcy, Webb & Knapp

---

proposition that the defendants are precluded from raising validly held defenses against" the trustee. (App. at 20a-21a).

had entered into an indenture agreement (the "Indenture") with Marine Midland Trust Company ("Marine"), pursuant to which Webb & Knapp issued five percent (5%) debentures in an amount in excess of $8.5 million. *Id.* In order to protect the debenture holders from a loss on their investments, Webb & Knapp was required to maintain a 2 to 1 asset to liability ratio. *Id.* at 418. Webb & Knapp was also required to file annual reports with Marine in order to verify compliance with its obligations under the Indenture. In its role as the indenture trustee, Marine promised to exercise due care and skill in monitoring Webb & Knapp's compliance with the terms of the Indenture. *Id.*

Subsequent to entering into the Indenture, Webb & Knapp began to incur sizable financial losses. *Id.* By the time Webb & Knapp entered bankruptcy on May 7, 1965, its liabilities were almost three times its assets—a clear violation of the Indenture. *Id.* at 419. On May 18, 1965, Caplin was appointed as trustee and began an investigation into Webb & Knapp's financial affairs. *Id.* As a result of the investigation, the trustee determined that Marine had either willfully or negligently failed to fulfill its duty to monitor Webb & Knapp's compliance with its obligations under the Indenture. *Id.* Accordingly, the trustee initiated an action against Marine, on behalf of the debenture holders, based on Marine's breach of the duty to monitor Webb & Knapp's compliance with the terms of the Indenture. *Id.* at 420. The district court dismissed the complaint, concluding that the trustee lacked standing to pursue claims on behalf of the debenture holders. The Second Circuit affirmed. *Caplin v. Marine Midland Grace Trust Co.*, 439 F.2d 118 (2d Cir. 1971).

In affirming the decisions of the lower courts that the trustee lacked standing to sue non-debtor third parties based on causes of action that were specific to a certain class of creditors, this Court recognized the difficulty of the issue

presented and that the issue "has caused even the most able jurists to disagree."[6] *Caplin,* 406 U.S. at 421-22. Nonetheless, this Court, cognizant of the nature of bankruptcy proceedings, the role of the trustee in bankruptcy, and the way in which standing to sue on behalf of creditors would affect or change the trustee's role, proceeded to identify several sound policy considerations for denying the trustee standing to bring the suits in question. Most importantly, this Court recognized that the question of whether to grant standing to assert claims belonging to a specific class of creditors against non-debtor third parties, was a policy decision that had to be left to Congress and not the judiciary.[7]

---

[6] In discussing the difficulty of the issue presented, as well as the disagreement among jurists, this Court cited to the case of *Clarke v. Chase Nat'l Bank*, 137 F.2d 797 (2d Cir. 1943), in which Judge Augustus Hand wrote the opinion holding that a trustee in bankruptcy does not have standing to sue third parties on behalf of creditors. *See Caplin*, 406 U.S. at 421-22. Judge Learned Hand, however, dissented in *Clarke* and was of the opinion that the trustee would have standing in such cases. *Clarke,* 137 F.2d at 806 (Hand, J., dissenting in part). *See also Barnes v. Schatzkin,* 212 N.Y.S. 536, 538-39 (N.Y. App. Div. 1925) (wherein a divided New York Supreme Court, Appellate Division, held that notwithstanding assignments of claims from creditors, a trustee in bankruptcy did not have standing to bring causes of actions specific to creditors). In light of the differing opinions of the Bankruptcy Court, the District Court, and the Court of Appeals in the present case, as well as the decisions of the other federal Courts of Appeal that have addressed the issue, it appears that able jurists continue to disagree on this issue post-*Caplin*.

[7] As discussed in detail *infra*, when Congress rewrote the bankruptcy laws in 1978, it considered a specific and detailed provision that would have expressly overruled *Caplin* and given bankruptcy trustees broad powers to bring actions against non-debtor third parties based on claims belonging to creditors. When the final version of the Bankruptcy Code was enacted, however, that provision was deleted. As a result,

Id. at 434. The Court could not find any evidence in the provisions of the Bankruptcy Act that supported congressional intent to confer such standing on trustees in bankruptcy and, accordingly, the Court determined that the trustee could not bring the causes of action that belonged to the creditors. *Id.* at 428-29. In reaching its decision in *Caplin*, this Court noted:

> First, Congress has established an elaborate system of controls with respect to indenture trustees and reorganization proceedings, and nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders.

Id. at 428. The Court further noted that section 110 of the Bankruptcy Act[8] did not grant the trustee such authority, but instead the trustee's responsibility was merely to collect and reduce to money the property of the estates for which he serves. *Id.* at 428-29.

In addition to finding no support under the Bankruptcy Act, the Court noted several facts that further demonstrated that bankruptcy trustees should not be imbued with such standing. For example, the Court recognized that the debtor itself had no independent action against Marine and that the trustee's claims against Marine, at the most, involved a situation where the debtor and Marine were *in pari delicto*. *Id.* at 429-30. Thus, the Court voiced its concern that, if the trustee were successful, Marine could very well be subrogated

---

numerous courts have continued to follow *Caplin* and have recognized that it remains the law after enactment of the Bankruptcy Code in 1978.

[8] The relevant parts of section 110 of the Bankruptcy Act are now embodied in sections 541 and 544 of the Bankruptcy Code. *See generally Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*, 816 F.2d 1222, 1227 (8th Cir. 1987).

to the claims of the creditors. *Id.* Although of no concern in the case *sub judice*, this Court also expressed reservations that the actions by the trustee on behalf of the creditors could produce results that were inconsistent with any actions that the creditors brought themselves. *Id.* at 431-32.

After determining that the trustee in *Caplin* did not have standing to assert the creditors' causes of action, and discussing the reasons in support thereof, this Court invited Congress to expressly grant or deny such standing to trustees in bankruptcy. *Id.* at 434-35. Specifically, this Court stated in *Caplin* that:

> Congress might well decide that reorganizations have not fared badly in the 34 years since [the reorganization chapter] was enacted and that the *status quo* is preferable to inviting new problems by making changes in the system. Or, Congress could determine that the trustee in a reorganization was so well situated for bringing suits against indenture trustees that he should be permitted to do so. In this event, Congress might also determine that the trustee's action was exclusive, or that it should be brought as a class action on behalf of all debenture holders, or perhaps even that the debenture holders should have the option of suing on their own or having the trustee sue on their behalf. Any number of alternatives are available. Congress would also be able to answer questions regarding subrogation or timing of law suits before these questions arise in the context of litigation. Whatever the decision, ***it is one that only Congress can make***.

Id. (emphasis added).

Six years after *Caplin* was decided, Congress rewrote the bankruptcy laws and enacted the Bankruptcy Code. In

conjunction with the enactment of the Bankruptcy Code, former sections 70c and 70e of the Bankruptcy Act, the former trustee provisions of the Bankruptcy Act that were at issue in *Caplin*, were combined into sections 544(a) and (b) of the Bankruptcy Code. H.R. 95-595, 95th Cong. 1st Sess. 370 (1977); S.R. 95-989, 95th Cong., 2d Sess. 85 (1977). Section 544 not only clarified the role of trustees in bankruptcy, but also expanded the trustee's role with respect to creditors. The new section 544, however, did not authorize the trustee to bring suits against third parties on behalf of the estate's creditors. To the contrary, the legislative history of section 544 suggests that Congress intended the exact opposite. *See Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*,816 F.2d 1222, 1227-28 (8th Cir. 1987). In enacting section 544, Congress contemplated overruling *Caplin* by adding subsection (c) to the new section 544.[9] The

---

[9] The proposed addition of section 544(c) was explained as follows:

> Subsection (c) is new. It overrules *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 [92 S.Ct. 1678, 32 L.Ed.2d 195] (1972), which precluded a [reorganization] trustee from enforcing a claim on behalf of debenture holders against an indenture trustee. The trustee is permitted to act as a class representative under this provision if the trustee has no other basis on which to recover on the claim involved; recovery will reduce the claim of a class of creditors or equity security holders and will not give rise to a corresponding but offsetting right of subrogation; and enforcement of the cause of action is in the best interest of the estate. Recovery in such an action is for the benefit of the class of creditors or equity security holders on whose rights the trustee has based the action. A judgment in the action binds all creditors or equity security holders that could have brought the action, and the court may stay the commencement or continuation of any other action on the same cause of action. All creditors that could have brought the action are given notice of the trustee's suit, and nothing

proposed section (c) would have expressly granted broad standing to bankruptcy trustees to bring a wide range of actions against non-debtor third parties on behalf of creditors:

> (c)(1) The trustee may enforce any cause of action that a ***creditor, a class of creditors***, an equity security holder, or a class of equity security holders ***has against any person***, if—
>
> (A) the trustee could not recover against such person on such cause of action other than under this subsection;
>
> (B) recovery by the trustee for the benefit of such creditor or equity security holder or the members of such class will reduce the claim or interest of such creditor or equity security holder or of such members, as the case may be, against or in the estate;
>
> (C) there is a reasonable likelihood that recovery against such person will not create an allowable claim in favor of such person against the estate; and
>
> (D) enforcement of such cause of action is in the best interest of the estate.
>
> (2) If the trustee brings an action on such cause of action--
>
> (A) the court, after notice and a hearing, may stay the commencement or continuation of any other action on such cause of action; and

---

> precludes such creditors from retaining their own attorneys and joining the action in their own behalf.

H.R.Rep. 95-595, 95th Cong., 1st Sess. 370-71 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6326, 6327.

> (B) the clerk shall give notice to all creditors or equity security holders that could have brought an action on such cause of action if the trustee had not done so.
>
> (3) A judgment in any such action brought by the trustee binds all creditors or equity security holders that could have brought an action on such cause of action. Any recovery by the trustee, less any expense incurred by the trustee in effecting such recovery, shall be for the benefit only of such creditors or equity security holders.

H.R. 8200, 95th Cong., 1st Sess. 416-17 (1977) (emphasis added). Although Congress considered overruling *Caplin* in the proposed section 544(c), when the Bankruptcy Code was ultimately enacted in 1978, that language was omitted. 124 CONG. REC. H11,097 (Sept. 28, 1978); S17,413 (Oct. 6, 1978). *See also Mixon,* 816 F.2d at 1228 ("[b]ecause Congress refused to enact subsection (c), we believe Congress' message is clear--*no* trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, has power under Section 544 of the Code to assert general causes of action...on behalf of the bankrupt estate's creditors.").

While not denying that the viability of and reasoning behind *Caplin* transcended the enactment of the Bankruptcy Code, the Court of Appeals has attempted to distinguish *Caplin* by virtue of the alleged unconditional nature of the assignments from the creditors to the Trustee in the present case. As the estate was now the absolute owner of the causes of action, the Court of Appeals reasoned, the Trustee was not asserting claims on behalf of creditors, but instead was simultaneously stepping into the shoes of the mortgage lenders <u>and</u> making the claims for the benefit of all creditors of the

estate generally.[10] (App. at 9a). The Court of Appeals further reasoned that because the assignors had relinquished all direct rights to seek recovery against the Debtors and the alleged coconspirators, the potential for duplicative and inconsistent litigation that concerned this Court in *Caplin* did not exist. (App. at 9a). The essence of the *Caplin* decision, however, was that Congress had not indicated an intention that bankruptcy trustees have standing to pursue assigned claims that otherwise had no relation to the debtor's estate, and that it is up to Congress, not the courts, to determine that such an expansion of the trustee role, and the attendant expansion of bankruptcy court jurisdiction, is appropriate. *Caplin*, 406 U.S. at 434. *See also Fisher, Hecht, & Fisher v. D.H. Overmyer Telecasting Co., Inc. (In re D.H. Overmyer Telecasting Co., Inc.)*, 56 B.R. 657, 660 (Bankr. N.D. Ohio) (recognizing that trustee in bankruptcy is a legal entity created by statute that can have no greater power or rights than the statute creates) (quoting *McCandless v. Furland*, 296 U.S. 140 (1935)). That reasoning applies with equal force whether the unrelated claims are assigned conditionally or unconditionally.

In a further effort to justify its ruling in the face of *Caplin*, the Court of Appeals reasoned that because section 541(a)(7) of the Bankruptcy Code expressly includes as property of the estate any interest in property that the estate acquires after the

---

[10] Such logic ignores the fact that, as of the time the action was commenced, the assignor creditors collectively held a high proportion of the claims against the estate, and that the action itself, if successful, would necessarily create additional creditors of and claims against the estate for contribution and indemnification. It also ignores the fact that if the lenders successfully pursued the claims themselves, their own claims against the bankruptcy estate would be reduced or eliminated entirely, which would also inure to the benefit of the estate and the other creditors.

bankruptcy filing, Congress must have intended for trustees to possess broad powers to bring actions against non-debtor third parties based on the claims of a specific class of creditors. (App. at 10a-11a). Such an interpretation, however, is in direct conflict with the prior decision of this Court in *Segal v. Rochelle*, 382 U.S. 375 (1966), and the legislative history of section 541(a).

In *Segal,* a case decided under the Bankruptcy Act, this Court specifically addressed the limitations on the types of property that become property of the bankruptcy estate after the commencement of a case. *Segal* involved the voluntary bankruptcy cases of Gerald and Sam Segal and their business partnership, Segal Cotton products. *Id.* at 375. Shortly after the filing of their voluntary petitions for relief, Rochelle was appointed as trustee in the three cases. *Id.* At the end of 1961, certain loss-carryback tax refunds were received on behalf of the two individual bankrupts. *Id.* The refunds arose from operating losses suffered by the partnership debtor prior to the bankruptcy filing, and were utilized to offset income from 1959 and 1960. *Id.* When the refunds were received, both the trustee and the individual debtors asserted that they were entitled to the funds. *Id.*

In deciding that the postpetition tax refund was property of the estate and could not be claimed by the two individual debtors, this Court stated that whether after-acquired property is included in the bankruptcy estate is determined by examining whether that property "is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start." *Id.* at 379-80. Applying this rule, the *Segal* Court held that a right to a tax refund that is received postpetition, but which arises from a tax return that is filed prepetition, is property of the estate. *Id.* at 381.

Although *Segal* was decided under the Bankruptcy Act, there is nothing contained in the legislative history of section 541(a) of the Bankruptcy Code that indicates that the rule in *Segal* was abandoned under the framework of the Bankruptcy Code. In fact, the legislative history of section 541(a) expressly states that it was intended to follow the result in *Segal*. H.R.Rep. 95-595, 95th Cong., 1st Sess. 367-8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 (1978); S.R. 95-989, 95th Cong., 2d Sess. 82-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868. Further, the interaction of section 541(a)(1) and section 541(a)(7) "actually reflect[s] the analytical framework in *Segal.*" *In re Doemling,* 127 B.R. 954, 957 (W.D. Pa. 1991). *See also Brown v. Dellinger (In re Brown),* 734 F.2d 119, 133 (2d Cir. 1984) (citing *Segal* with approval); *Doan v. Hudgins (In re Doan),* 672 F.2d 831, 833 (11th Cir. 1982) (legislative history makes clear that *Segal* remains the law and is not restricted to loss carrybacks).

Federal Courts have continued to adhere to the rule announced in *Segal* following the enactment of the Bankruptcy Code. In *Rau v. Ryerson (In re Ryerson),* the Ninth Circuit was faced with the question of whether termination payments received postpetition by a Chapter 7 debtor, based on a prepetition employment contract, were property of the bankruptcy estate. 739 F.2d 1423 (9th Cir. 1984). At the time he filed his voluntary Chapter 7 petition, the debtor in *Ryerson* was party to an employment contract that provided for certain payments in the event he was terminated from his position. *Id.* at 1424. Approximately nine months after filing his Chapter 7 petition, the debtor was terminated and became entitled to the termination payments under the prepetition employment contract. *Id.* Citing to the rule set forth in *Segal,* the Ninth Circuit found that because the termination payments were based on years of service

completed prior to the bankruptcy, they were "sufficiently rooted in the prebankruptcy past" to constitute property of the estate. *Id.* at 1426.

An even better example of the limitations contemplated in *Segal* is set forth in *In re Doemling*, 116 B.R. 48 (Bankr. W.D. Pa. 1990), *aff'd*, 127 B.R. 954, 957 (W.D. Pa. 1991). In *Doemling*, the Chapter 11 debtor was injured in an automobile accident some five months after the petition date, and the unsecured creditors committee asserted a claim to the debtor's tort action as being in the nature of property acquired by the estate after the commencement of the case. *Id.* at 48-49. In holding that the tort action belonged to the debtor and not the estate, the bankruptcy court aptly described the temporal limitations that apply to after-acquired property under section 541(a)(7):

> [A] property interest acquired postpetition during the pendency of a Chapter 11 case qualifies as property of the estate, for purposes of § 541(a)(7), only if said property interest is ***traceable*** to (***or arises out of***) some prepetition property interest which is already included in the bankruptcy estate.

Doemling, 116 B.R. at 50 (citing to *In re Acton Food Service Corp.*, 39 B.R. 70, 72 (Bankr. D. Mass. 1984) and *In re Weyland*, 63 B.R. 854, 864 (Bankr. E.D. Wis. 1986)) (emphasis added).

The legislative history for subsection 541(a)(7) further confirms that Congress intended the bankruptcy estate to include only property in which the debtor held some interest:

> [A]ny interest in property that the estate acquires after the commencement of the case is property of the estate; for example, if the estate enters into a contract, after the commencement of the case, such a contract would be property of the estate. The addition of this

> provision by the House amendment merely clarifies that section 541(a) is an all embracing definition which includes charges on property, such as liens held by the debtor on property of a third party, or beneficial rights and interests that the debtor may have in property of another. ***However only the debtor's interest in such property becomes property of the estate.***

124 CONG. REC. H. 11,086 (Sept. 28, 1978), S 17,413 (Oct. 6, 1978) (emphasis added). Thus, Congress clearly intended that in order to be property of the estate under section 541(a)(7), the after acquired property must emanate from, or have its genesis in, the ***debtor's*** pre-bankruptcy property rights and interests.[11]

The causes of action assigned to the Trustee in the instant case do not emanate from the Debtors' pre-bankruptcy property, but, instead, arise out of the Debtors' fraudulent and illegal pre-bankruptcy conduct. Moreover, these are not causes of action that the Debtors themselves could have

---

[11] A good example of property interests that would become property of the bankruptcy estate under section 541(a)(7) is when a non-debtor party commits a post-bankruptcy breach of a pre-bankruptcy contract that is held by the debtor. Although the contract existed prior to the bankruptcy, and was an asset of the estate at the time the bankruptcy was filed, the breach by the other party to the contract occurred after the commencement of the case and any action on the breach would, likewise, accrue after the commencement of the case. Under such circumstances, the cause of action for the breach would clearly be property of the estate under section 541(a)(7) and a trustee would be entitled to bring the action. *See In re Acton Food Service Corp.*, 39 B.R. 70, 72 (Bankr. D. Mass. 1984) (a cause of action that accrued postpetition was property of the bankruptcy estate because the injury was to a prepetition property interest that had become part of the bankruptcy estate upon the filing of the petition).

brought either prior to or after the bankruptcy filing as they belonged exclusively to the creditors. *See Hirsch v. Arthur Andersen & Co. (In re Colonial Realty Co.)*, 72 F.3d 1085, 1093 (2d Cir. 1995) (trustee in bankruptcy may only bring claims founded on the rights of the debtor); *Nat'l City Bank v. Lapides, (In re Transcolor Corp.)*, 296 B.R. 343, 367 (Bankr. D. Md. 2003) (same); *Barnes v. Schatzkin*, 212 N.Y.S. 536, 538-39 (N.Y. App. Div. 1925) (notwithstanding assignments from creditors, trustee in bankruptcy only has right to pursue actions that debtor could pursue).

II. THE DECISION OF THE COURT OF APPEALS CREATES A SPLIT WITH OTHER FEDERAL CIRCUITS.

Consistent with the legislative histories of sections 544(c) and 541(a), all other federal appeals courts that have addressed the standing issue present here have adhered to the principles enunciated in *Caplin.*[12] *See Hirsch*, 72 F.3d at 1093; *Steinberg v. Buczynski (In re Ted's Plumbing, Inc.)*, 40 F.3d 890 (7th Cir. 1994); *E.F. Hutton v. Hadley (In re GIC Gov't Securities, Inc.)*, 901 F.2d 979 (11th Cir. 1990); *Williams*, 859 F.2d at 664; *Mixon*, 816 F.2d at 1222. For example, in *Williams*, the Ninth Circuit Court of Appeals held that a Chapter 7 trustee did not have standing to bring suit against a bank on behalf of the debtor's creditors, regardless of the fact that the creditors had assigned their claims to the trustee. 859 F.2d at 666. *Williams* involved a debtor who, as part of a "Ponzi" scheme, financed its business through the sale of investment contracts and notes that guaranteed a ten percent (10%) return. *Id.* at 665. When the scheme collapsed and the debtor was forced into Chapter 7, the trustee sued the

---

[12] Petitioners were unable to find a single Court of Appeals decision holding that *Caplin*, and the principles set forth therein, are no longer controlling.

bank that had acted as the debtor's depository at certain times during the scheme. *Id.* In denying the trustee standing to bring the creditors' claims, the Ninth Circuit expressly stated that this Court's opinion in *Caplin* was controlling. *Id.* at 666. In addition, and most importantly, the Ninth Circuit noted, as this Court did in *Caplin,* that the debtor itself had no claim that it could bring against the bank. *Id.*at 667. The Ninth Circuit further recognized, as in *Caplin*, that the trustee may well stand *in pari delicto* with the bank and, thus, the bank would likely be subrogated to the creditors' claims if the bank was held liable. *Id.* Furthermore, the Ninth Circuit stated that "we do not think the mere fact of assignment in order to allow the Trustee to pursue the claims for the creditors sufficiently distinguishes this case to allow for a different result."[13] *Id.* at 666.

The Second Circuit also followed the basic tenets of *Caplin* in ruling that the trustee in *Hirsch v. Arthur Andersen & Co. (In re Colonial Realty Co.)*, did not have standing to assert claims against non-debtor third parties when the claims belonged to the debtor's creditors. 72 F.3d at 1093. In *Hirsch,* as in *Williams,* the debtor and its principals operated a Ponzi scheme in which they sold real estate limited partnerships to unsuspecting investors. *Id.* at 1088. Ultimately, the debtor and its principals were put into an involuntary Chapter 11 and a trustee was appointed. *Id.* at 1090. The trustee initiated an action against the debtor's accountants based on allegations that they participated in the scheme with the debtor *Id.* at 1093. In affirming the dismissal of the case based on the trustee's lack of standing, the Second Circuit cited favorably to *Caplin* and based is

[13] As it did with *Caplin*, the Court of Appeals attempted to distinguish *Williams* on the basis that the assignments involved in that case were not unconditional assignments.

decision on the same underlying reasons set forth in *Caplin*. *Id.* First, the Second Circuit recognized that "[u]nder the Bankruptcy Code, the bankruptcy trustee may bring claims founded, *inter alia, **on the rights of the debtor*** and on certain rights of the debtor's creditors, *see, e.g.*, 11 U.S.C. §§ 541, 544, 547 (1982 & Supp. V 1987)." *Id.* at 1093 (emphasis added). Thus, the trustee merely stands in the shoes of the debtors and succeeds only to those causes of action that the debtor could have brought absent the bankruptcy. *Id.* Second, the *Hirsch* court held that when creditors have a cause of action based on an injury that is particularized to them, they have the exclusive right to bring such actions. *Id.* Finally, the Second Circuit cited to *Caplin* for the proposition that the trustee in bankruptcy only has standing to represent the interests of the debtor and has no standing to assert claims for damages to defrauded creditors.[14] *Id.*

The Court of Appeals' decision in the instant case creates a conflict between it and these other circuits that can only be resolved by this Court.

III. BECAUSE IT EXPANDS THE JURISDICTION OF BANKRUPTCY COURTS AND THE ROLE OF TRUSTEES, THE COURT OF APPEALS DECISION IMPACTS IMPORTANT FEDERAL ISSUES.

The role of the trustee in bankruptcy, as a central part of the statutory scheme established by Congress, is defined by

---

[14] These fundamental principles were recognized years before this Court's decision in *Caplin*. For example, almost a hundred years ago, the Supreme Court of Michigan, in *Monroe v. Bushnell*, 122 N.W. 508, 512 (Mich. 1909), held that a trustee in bankruptcy could not sue upon a claim that had not existed in favor of the bankrupt entity and had been merely assigned to the trustee post-bankruptcy. *See also Barnes*, 212 N.Y.S. at 538-39 (same).

those powers and responsibilities that are expressly granted by Congress. *See Caplin*, 406 U.S. at 423. *See also Fisher, Hecht, & Fisher v. D.H. Overmyer Telecasting Co., Inc. (In re D.H. Overmyer Telecasting Co., Inc.)*, 56 B.R. 657, 660-61 (Bankr. N.D. Ohio) (quoting *McCandless v. Furland*, 296 U.S. 140 (1935)). Left undisturbed, the Decision of the Court of Appeals stands to expand dramatically that role by adding a responsibility to consider, and the power to pursue, claims that did not belong to the debtor, and which otherwise have no nexus to the debtor or the bankruptcy estate. Such an expansion of the trustee's role would also impede the trustee's duty to expeditiously liquidate property of the estate (and not "create" or "manufacture" property of the estate by acquiring expensive litigation that will prolong the bankruptcy case). *See* 11 U.S.C. § 704(1); *Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson)*, 5 F.3d 750, 753-54 (4th Cir. 1993). The pursuit of such claims would likewise create additional administrative expenses for the estate. *See Barnes*, 212 N.Y.S. at 539 (if a trustee is permitted to take assignments of claims, he might take an assignment from any stranger and force the estate into expensive litigation). The Decision by the Court of Appeals may also serve to subvert the role played by bankruptcy courts by drawing them into causes of action that Congress has determined are better left to state courts to adjudicate.

Congress created the bankruptcy courts as specialized courts of limited jurisdiction that were established to aid in the distribution of a ***debtor's*** limited assets. The Court of Appeals expansion of a bankruptcy trustee's power to prosecute assigned claims will result in a corresponding expansion of the bankruptcy court's jurisdiction, including its jurisdiction over non-core, state-law tort and contract claims that, absent diversity jurisdiction, could not otherwise be brought in a federal court. *See* 28 U.S.C. § 157(b) (describing actions that

a bankruptcy court may hear and in which it may enter final orders). As a further consequence of the Court of Appeals decision, the already over-burdened bankruptcy courts, with their limited resources, will have less time and fewer resources to devote to the matters that Congress actually intended those courts to handle.

Finally, exercise of the authority extended to bankruptcy trustees by the Court of Appeals, while consuming the resources of the bankruptcy estate, is unlikely to bestow any benefit on the estate. As suggested by the Dissenting Opinion, if the matter is returned to the Bankruptcy Court and the suits are allowed to proceed, Petitioners will not only assert counter claims against the Trustee, but they will also be subrogated to the claims of the mortgage lenders. Therefore, even assuming the Trustee's suit is successful, any positive impact on the estate is likely to be offset. In fact, if the Petitioners are successful in asserting their counter claims, there could be a net negative effect on the estate even before considering what estate resources were consumed by the Trustee in pursuing questionable litigation.

These potential impacts on the administration of justice in the federal bankruptcy courts warrant this Court's consideration and reversal of the Court of Appeals decision.

IV. IN INSULATING THE TRUSTEE FROM THE *IN PARI DELICTO* DEFENSE, THE COURT OF APPEALS DECISION FUNDAMENTALLY ALTERS THE STATUS OF A TRUSTEE CONTEMPLATED BY CONGRESS IN ENACTING THE BANKRUPTCY CODE.

A bankruptcy trustee, as a successor to a debtor's interest under section 541 of the Bankruptcy Code, stands in the shoes of the debtor and is subject to the same defenses as could have

been asserted against the debtor, including the defense of *in pari delicto*. *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 356 (3d Cir. 2001) (applying *in pari delicto* to bar suit by committee and stating that "the trustee is, of course, subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor") (internal quotation marks and citations omitted); *Terlecky v. Hurd (In re Dublin Securities, Inc.)*, 133 F.3d 377, 380 (6th Cir. 1997) (the issue of trustee's standing to pursue claims of creditors against third-parties need not be reached as the equitable defense of *in pari delicto* required dismissal of trustee's claim); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) ("[w]hen a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors.").

As noted by Judge King in his dissent, the defense of *in pari delicto* is an equitable doctrine that "under Maryland's formulation of that defense, the courts are to be concerned with '***the policy of the law***.'" (App. at 21a) (quoting *Schneider v. Schneider*, 644 A.2d 510, 517 (Md. 1994) (emphasis added) (quoting *Cronin v. Hebditch*, 74 A.2d 50 (Md. 1950))). In addition, in applying the doctrine of *in pari delicto*, Maryland law recognizes that the "court may exercise the [furthest] breadth of its discretion in determining its applicability." (App. at 21a) (internal quotation marks and citations omitted). Accordingly, based on the circumstances present in this case, the Bankruptcy Court, as affirmed by the District Court, properly applied the defense of *in pari delicto* and did not abuse its discretion in doing so.

In the present case, there is no question that had the Debtors sued the Petitioners for losses the Debtors suffered as a result of the Debtors' own illegal scheme, they would be

subject to the *in pari delicto* defense.[15] Yet, in a departure from the well- established boundaries of the trustee's role, the Court of Appeals found the doctrine inapplicable with regard to the assigned claims. In doing so, the Panel Decision did not appear to consider whether the lower courts' application of the doctrine amounted to an abuse of discretion, rather, the Panel Decision simply concluded that the doctrine simply could not be applied to the Trustee where the claims were unconditionally assigned.

Specifically, the Court of Appeals concluded that the doctrine was not applicable in this case because the Trustee was suing on behalf of the estate as an assignee of the mortgage lenders:

> As assignee, the trustee stands in the shoes of the mortgage lenders, thereby assuming all rights and interests that the mortgage lenders have in the causes of action and becoming subject to all defenses that could have been asserted against the mortgage lenders, not Bogdan. Because there is no allegation that the mortgage lenders were involved in any wrongdoing relating to the "flipping scheme," the alleged coconspirators cannot assert the defense of *in pari delicto* against the trustee, as assignee of the mortgage lenders, to bar recovery by the trustee on behalf of the estate.

(App. at 13a-14a) (internal citations omitted). The Court of Appeals also rejected the argument that allowing the Trustee to pursue the assigned claims could ultimately result in the Debtors profiting from their wrongdoing by enabling the

---

[15] As noted, on December 19, 2000, Bogdan entered a guilty plea to charges, *inter alia*, of conspiracy to commit mail and wire fraud and making false statements.

Debtors to receive some of the proceeds recovered from the Petitioners pursuant to section 726(a)(6) of the Bankruptcy Code. *See* 11 U.S.C. § 726(a)(6) (providing that property of the Estate shall be distributed ... (6) sixth, to the debtor). The Court of Appeals concluded that a distribution to the Debtors was not a concern because it is unlikely that the sums recovered in this proceeding would satisfy all claims against the Debtors' bankruptcy estates and because the alleged coconspirators "can attempt to raise the doctrine of *in pari delicto* against" the Debtors themselves if a distribution is to be made to the Debtors at the conclusion of the bankruptcy case. (App. at 14a-15a).

Notwithstanding the Court of Appeals' efforts to downplay it, the policy reason underlying the *in pari delicto* defense, to prevent a wrongdoer from profiting from his own misdeeds, is fully applicable here. Under the mandatory distribution scheme established by section 726 of the Bankruptcy Code, after payment of all other claims, "property of the Estate shall be distributed... (6) sixth to the debtor." 11 U.S.C. § 726(a)(6). Hence, theoretically, if the Trustee were successful in recovering both compensatory and punitive damages, a portion of the proceeds could be distributed to the Debtors. While there is nothing in the record with respect to either the aggregate amount of claims against the estate or the availability of other estate assets to satisfy those claims, the Panel Decision brushed aside such an outcome on the assumption that, even with a recovery under the suit, it is unlikely that all creditors' claims would be paid in full. Even accepting the accuracy of that assumption, the broad rule that would be established by the Panel Decision would make such a result possible in future cases. The Panel Decision also suggested that the creditors could prevent a recovery by the Debtors by invoking the doctrine of *in pari delicto* at the time of distribution. (App. at 14a-15a). However, there is no

mechanism available under the Bankruptcy Code to allow the Trustee to distribute surplus funds to anyone other than the Debtors once all other creditors are paid in full, nor is there any authority to support the Panel Decision's novel suggestion that the Petitioners could assert *in pari delicto* in defense to any proposed distribution to the Debtors. Moreover, the Panel Decision's suggestion begs the question, if there are surplus funds in the estate that are not distributed to the Debtors, to whom could they lawfully be distributed? The Bankruptcy Code simply does not contemplate such a scenario.

In his dissent, Judge King found that the Bankruptcy Court and the District Court had properly exercised their discretion in applying the doctrine to bar the claims:

> Put simply, one of several thieves, purportedly acting on behalf of his victims, is suing his fellow thieves. The stench arising from such a proceeding–being pursued in a federal court of equity–cannot be concealed by any amount of perfume.

(App at 19a). Petitioners submit that Judge King was on the mark: not only was the doctrine of *in pari delicto* appropriately applied by the lower courts, its application was necessary to preserve the dignity of the bankruptcy process and the role of the trustee.

CONCLUSION

For all of the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 31st day of October, 2005,

Robert S. Brennan
Counsel of Record
Richard L. Costella
Paul D. Trinkoff
John R. Fischel
Miles & Stockbridge P.C.
10 Light Street
Baltimore, Maryland 21202
(410) 727-6464

Robert L. Ferguson, Jr.
Ferguson, Schetelich & Ballew, P.A.
1401 Bank of America Center
100 South Charles Street
Baltimore, Maryland 21201-2727
(410) 837-2200

Brian C. Parker
Parker, Dumler & Kiely, LLP
36 S. Charles Street
Suite 2200
Baltimore, Maryland 21201-2725
(410) 625-9330

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1643

[Filed August 2, 2005]

In Re: MICHAEL BOGDAN,	)
a/k/a Andrew Michael Bogdan;	)
INNER CITY MANAGEMENT, LLC,	)
Debtors	)
--	)
SEAN C. LOGAN, Chapter 7 Trustee,	)
Trustee-Appellant,	)
	)
v.	)
	)
JKV REAL ESTATE SERVICES;	)
FIDELITY NATIONAL TITLE INSURANCE;	)
STEWART TITLE GUARANTY COMPANY;	)
JOHN K. VOYATZIS,	)
Defendants-Appellees.	)
	)

Before KING and SHEDD, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation.

ON PETITION FOR REHEARING AND REHEARING EN BANC

The appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS SO ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge King, Judge Shedd, and Judge Floyd.

For the Court,

/s/______________________________
Patricia S. Connor
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1643

[Filed July 6, 2005]

In Re: MICHAEL BOGDAN,	)
a/k/a Andrew Michael Bogdan;	)
INNER CITY MANAGEMENT, LLC,	)
Debtors	)
--	)
SEAN C. LOGAN, Chapter 7 Trustee,	)
Trustee-Appellant,	)
	)
v.	)
	)
JKV REAL ESTATE SERVICES;	)
FIDELITY NATIONAL TITLE INSURANCE;	)
STEWART TITLE GUARANTY COMPANY;	)
JOHN K. VOYATZIS,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the District of Maryland, at Baltimore
(CA-04-438-AMD; BK-00-60732-JS)
Andre M. Davis, District Judge

Before KING and SHEDD, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation.

OPINION

SHEDD, Circuit Judge:

This bankruptcy appeal requires us to determine whether the bankruptcy trustee has standing to sue, as the assignee of certain creditors, to recover on behalf of the bankruptcy estate for damages caused to these creditors by the debtor's alleged coconspirators. The bankruptcy court dismissed the trustee's amended complaint, concluding that the trustee lacked standing to assert claims against the alleged coconspirators. The district court affirmed the bankruptcy court's judgment. Based on the unique facts and circumstances of this case, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

I.

In 2000, Michael Bogdan and his corporation, Inner City Management, LLC (referred to collectively as "Bogdan") filed petitions for bankruptcy relief. The bankruptcy court appointed Sean C. Logan (the "trustee") as trustee of the Bogdan estate.

In 2001, Bogdan pleaded guilty to a federal criminal information alleging a single count of conspiracy to commit mail and wire fraud and to make false statements relating to his participation in the real estate scheme that is the subject of this adversary proceeding. In 2002, after conducting an extensive review of Bogdan's business activities, the trustee determined that nearly fifty other persons and entities -- real

estate appraisers, settlement agents, mortgage brokers, and title insurance companies -- also participated with Bogdan in the real estate "flipping scheme" that defrauded numerous mortgage lenders by obtaining under-collateralized mortgage loans to purchase properties in Baltimore City. Twelve of these mortgage lenders that were injured by this scheme unconditionally assigned to the trustee all of their claims against Bogdan and his alleged coconspirators.

The trustee then filed this adversary proceeding in the bankruptcy court as the assignee of these mortgage lenders, alleging claims for civil conspiracy, intentional misrepresentation, fraudulent concealment, negligence, and breach of contract against four of Bogdan's alleged coconspirators. According to the trustee, if he prevails on his claims against the alleged coconspirators, the mortgage lenders will not recover any money from the adversary proceeding. Instead, the mortgage lenders will recover, if at all, only as creditors of the estate on a pro rata basis with all other creditors.[1] The trustee's amended complaint seeks

---

[1] Although he did not attach copies of the assignments to his amended complaint, the trustee provided copies of some of the assignments to the alleged coconspirators during the bankruptcy court proceedings and represented to that court that the assignments are unconditional, meaning that the estate is the only entity that could possibly make any recovery in this adversary proceeding. Neither the bankruptcy court nor the district court found it necessary to construe the provisions of the assignments, instead concluding that the trustee lacked standing to sue regardless of what the assignments provided. Copies of the assignments are not included in our appellate record. Nevertheless, the trustee repeats his representation that the assignments give him an unconditional right to recover all monies on behalf of the estate, and the mortgage lenders may recover, if at all, only as creditors of the estate. The

nearly $1 million in actual damages and $500,000 in punitive damages relating to 39 mortgage loans.

II.

The bankruptcy court dismissed the trustee's amended complaint, concluding that the trustee lacked standing to sue Bogdan's coconspirators for two reasons. First, the court ruled that the mortgage lenders' causes of action belong exclusively to them and not Bogdan's trustee because the action is premised on injury to the creditors, not Bogdan. The assignments by the mortgage lenders to the trustee do not, the court decided, give the trustee standing to pursue claims against the alleged coconspirators. Second, the court ruled that the trustee lacked standing based on the doctrine of *in pari delicto*, which bars a wrongdoer -- such as Bogdan -- from recovering against his coconspirators for injuries they jointly caused.

The district court affirmed based largely on the same reasoning as the bankruptcy court. In particular, the district court determined that the mortgage lenders, not the trustee, were the real parties in interest and that the trustee does not have standing to assert causes of action on behalf of creditors notwithstanding the assignments. The trustee now appeals.

III.

We review the judgment of a district court sitting in review of a bankruptcy court de novo, applying the same standards of review that were applied in the district court.

---

alleged coconspirators do not attack this representation, and we assume it to be true for purposes of this appeal.

Devan v. Phoenix Am. Life Ins. Co. (In re Merry-Go-Round Enters.), 400 F.3d 219, 224 (4th Cir. 2005). Specifically, "we review the bankruptcy court's factual findings for clear error, while we review questions of law *de novo.*" *Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.)*, 128 F. 3d 203, 206 (4th Cir. 1997).

IV.

A.

In affirming the dismissal of the amended complaint, the district court ruled that the trustee does not have standing to assert claims that belonged to the mortgage lenders, even though the mortgage lenders formally assigned their claims to the trustee. This ruling effectively establishes a per se ban on claims by trustees as assignees of creditors. The district court relied on the Supreme Court's opinion in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972), to support its ruling. We conclude, however, that *Caplin* is distinguishable for several reasons.

More than a decade before commencement of its bankruptcy proceedings, the debtor in *Caplin* issued debentures through Marine Midland Trust Company ("Marine"). One of the debtor's critical obligations under its agreement with Marine was that it maintain an asset-liability ratio of 2 to 1. This obligation was intended to protect the debenture holders from loss on their investments. The debtor was also required to file annual reports with Marine verifying its compliance with its obligations. Marine promised to exercise due care and skill in monitoring the debtor's compliance. *Id.* at 417-18.

For several years after issuing the debentures, the debtor incurred such substantial financial losses that by the time it entered bankruptcy, the debtor had roughly three times more liabilities than assets, a clear violation of its debenture obligation. *Id.* at 418-19. After conducting his investigation into the debtor's financial affairs, the trustee of the debtor's estate determined that Marine had either willfully or negligently failed to fulfill its duty to monitor the debtor's compliance with its obligations. The trustee filed an action against Marine on behalf of *the debenture holders*, not the debtor's estate. *Id.* at 420. The district court dismissed the complaint, concluding that the trustee lacked standing to pursue claims on behalf of the debenture holders, and the Second Circuit affirmed. *Caplin v. Marine Midland Grace Trust Co.*, 439 F.2d 118 (2d Cir. 1971).

The Supreme Court affirmed for three reasons. First, the Court concluded that there was no provision in the bankruptcy laws allowing a trustee to assume the responsibility of suing on behalf of *creditors of the estate*. The Court held that a trustee is not authorized to "collect money not owed to the estate." *Caplin*, 406 U.S. at 428. Second, the Court reasoned that the debenture holders, rather than the trustee, should be allowed to decide whether to sue Marine. These holders, the Court stated, "are capable of deciding for themselves whether or not it is worthwhile to seek to recoup whatever losses they may have suffered by an action against" Marine. *Id.* at 431. Third, the Court concluded that because the debenture holders would not be bound by the judgment in the trustee's action against Marine, they would be able to sue Marine directly in a separate suit, thereby increasing the amount and complexity of litigation relating to the losses suffered by the debenture holders. *Id.* at 432. For these reasons, the Court held that the trustee lacked standing to sue Marine. *Id.* at 432-34.

The facts of this case and *Caplin* are substantially different. It does not follow from the reasons advanced by the Court in *Caplin* that the trustee lacks the necessary standing in this case to assert his claims against Bogdan's alleged coconspirators on behalf of Bogdan's estate. First, while the trustee in *Caplin* attempted to assert claims directly on behalf of the debtor's creditors, Bogdan's trustee is not making any claim on behalf of the creditors. By taking unconditional assignments from the creditors, the trustee, as assignee, is making his claim on behalf of Bogdan's estate, not on behalf of the mortgage lenders. The mortgage lenders will recover nothing directly from any recovery attained from the trustee's adversary proceeding against Bogdan's alleged coconspirators. The mortgage lenders will recover, if at all, like any other creditor of the estate, by sharing from the assets the trustee is able to collect on behalf of the estate.

Second, unlike the debenture holders in *Caplin*, the mortgage lenders in this case have affirmatively elected how best to deal with their claims against Bogdan's alleged coconspirators. By unconditionally assigning their claims to the trustee, the mortgage lenders have decided to abandon their claims against the alleged coconspirators to allow the trustee to seek recovery against them on behalf of the estate. Thus, the mortgage lenders have chosen to attempt to recover, if at all, as creditors of the estate along with all the other estate creditors.

Third, unlike in *Caplin*, there is no potential for duplicative and inconsistent litigation by the mortgage lenders who have assigned their claims to Bogdan's trustee. By giving the trustee unconditional assignments of their potential claims, the mortgage lenders have relinquished all rights to seek recovery against Bogdan and the alleged coconspirators.

Thus, the district court's per se ban on trustee suits based on assignments from creditors finds no support in *Caplin*.

Contrary to the district court's per se prohibition, the Bankruptcy Code implicitly authorizes such a suit under the particular facts and circumstances of this case. Under the Code, a bankruptcy trustee represents the estate and "has capacity to sue and be sued." 11 U.S.C. § 323(b). The trustee is specifically authorized to "collect and reduce to money the *property of the estate* for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." *Id.* § 704(1) (emphasis added). The meaning of "property of the estate" under the Code has been construed "broadly to encompass all kinds of property, including intangibles." *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F. 3d 487, 490 (3d Cir. 1997). More specifically, "property of the estate" under § 541(a) has "uniformly been interpreted to include causes of action." *Polis v. Getaways, Inc. (In re Polis)*, 217 F.3d 899, 901 (7th Cir. 2000). "Property of the estate" also includes "any interest in property that the estate acquires after the commencement" of a bankruptcy case. 11 U.S.C. § 541(a)(7). Thus, the unconditional assignments acquired by Bogdan's trustee from the mortgage lenders after commencement of this bankruptcy case constitute "property of the estate" that the trustee is authorized to "collect and reduce to money" on behalf of the estate. *See Steinberg v. Kendig (In re Ben Franklin Retail Stores)*, 225 B.R. 646, 650 (Bankr. N.D. Ill. 1998) (ruling that the creditors' assignments turned the "causes of action into property of the estates and the Trustee has a duty to marshal those assets for the benefit of the estates"), *aff'd in part and rev'd in part on other grounds*, 2000 U.S. Dist. LEXIS 276, 2000 WL 28266 (N.D. Ill. Jan. 12, 2000) (unpublished). Accordingly, the trustee has the requisite standing to sue Bogdan's alleged coconspirators

"to collect and reduce to money" the causes of action he acquired for the estate from the mortgage lenders after commencement of this bankruptcy case.

The alleged coconspirators nevertheless argue that the unconditional assignments do not confer standing on Bogdan's trustee, citing the Ninth Circuit's opinion in *Williams v. California 1st Bank (In re estate of Chacklan Enters., Inc.)*, 859 F.2d 664 (9th Cir. 1988). We conclude, however, that *Williams* actually suggests that the unconditional assignments acquired by Bogdan's trustee sufficiently confer standing.

The debtor in *Williams* allegedly participated with the defendant bank in a "Ponzi" scheme defrauding investors. The bankruptcy trustee solicited and obtained assignments from some of the injured investors and brought an action against the bank. Rather than unconditional assignments, these injured investors gave up their claims in exchange for the trustee's promise to recommend to the bankruptcy court that these particular investors only receive the balance of any recovery the trustee might secure in the lawsuit against the bank after the estate paid priority claims and recouped its administrative costs. *Id.* at 665.

The Ninth Circuit decided that the trustee lacked standing notwithstanding the assignments. The court concluded that the investors remained the "real parties in interest" because "the bulk of any recovery" had been reserved specifically for them. *Id.* at 666. The court reasoned that the investors, in effect, "assigned their claims only for purposes of bringing suit" and, as a result, the trustee was improperly attempting to collect money owed to the investors, not the estate. *Id.* at 667.

The unconditional assignments acquired by Bogdan's trustee differ substantially from the assignments the trustee acquired in *Williams*. As asserted by Bogdan's trustee, the assignments he obtained do not reserve any part of the potential recovery exclusively for the mortgage lenders that assigned their claims. Unlike the investors in *Williams*, the mortgage lenders in this case will recover, if at all, by sharing from the general assets of the estate on a pro rata basis with all other creditors. So, unlike the trustee in *Williams*, Bogdan's trustee is seeking to collect money it claims the alleged coconspirators owe the trustee as assignee and representative of the estate, not money owed to specific creditors. Accordingly, Bogdan's estate is the real party in interest in this adversary proceeding.

The alleged coconspirators also complain that allowing bankruptcy trustees to sue based on assignments would dramatically and improperly expand the jurisdiction of the bankruptcy courts. They warn that such a rule would prompt trustees to seek out and purchase unrelated causes of action and pursue them in adversary proceedings in hope of increasing the assets of the estate.

This concern is unwarranted specifically in this case and generally in the broader bankruptcy practice context. As for this case specifically, the alleged coconspirators concede that no estate assets were paid to acquire the assignments from the mortgage lenders. Moreover, the trustee and the alleged coconspirators agree that this adversary proceeding is directly related to the bankruptcy case. The collapse of the "flipping scheme" caused, at least in part, Bogdan's bankruptcy.

More generally, our holding in this case is unlikely to lead trustees to hunt down and purchase assignments of causes of action unrelated to the bankruptcy case. The Bankruptcy Code

gives bankruptcy courts broad discretion to monitor all aspects of bankruptcy cases and to prevent abuses of process. *See, e.g.*, 11 U.S.C. § 105(a) (providing that bankruptcy courts may, sua sponte, take action to prevent an abuse of process); *id*. § 330 (granting bankruptcy courts authority to approve or reject, based on a wide-range of factors, compensation applications by trustees for expenses incurred and services rendered). Moreover, our cases establish that trustees must always act in the best interest of the estate. *See, e.g., Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson)*, 5 F.3d 750, 752 (4th Cir. 1993) (stating that "equity tolerates in bankruptcy trustees no interest adverse to the trust") (quoting *Mosser v. Darrow*, 341 U.S. 267, 271, 71 S. Ct. 680, 95 L. Ed. 927 (1951)). These checks and balances will help ensure that trustees forego actions not in the best interests of the bankruptcy estate.

B.

The district court also ruled that the trustee lacks standing based on the doctrine of *in pari delicto*. We disagree.

The common-law doctrine of *in pari delicto* (meaning "of equal fault") is often described as an affirmative defense that bars a wrong-doer from recovering against his alleged coconspirators. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 135, 138, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984); *Burlington Indus., Inc. v. Milliken & Co.*, 690 F.2d 380, 387 (4th Cir. 1982). This doctrine has no application in this adversary proceeding because the trustee is suing on behalf of the estate as assignee of the mortgage lenders. As assignee, the trustee stands in the shoes of the mortgage lenders, thereby assuming

all rights and interests that the mortgage lenders have in the causes of action and becoming subject to all defenses that could have been asserted against the mortgage lenders, not Bogdan. *See James v. Goldberg*, 256 Md. 520, 261 A.2d 753, 757 (Md. 1970); *Harris v. Max Kohner, Inc.*, 230 Md. 349, 187 A.2d 97, 100 (Md. 1963). Because there is no allegation that the mortgage lenders were involved in any wrongdoing relating to the "flipping scheme," the alleged coconspirators cannot assert the defense of *in pari delicto* against the trustee, as assignee of the mortgage lenders, to bar recovery by the trustee on behalf of the estate.

The alleged coconspirators complain that allowing the trustee to recover on behalf of the estate in this proceeding could ultimately result in Bogdan personally recovering from his alleged coconspirators -- the precise inequity the doctrine of *in pari delicto* is designed to avoid. This could happen, the alleged coconspirators assert, if the trustee recovers more money than necessary to satisfy all the creditors' claims. They claim that, if that occurs, the bankruptcy court would be required to distribute the surplus property of the estate to Bogdan personally. *See* 11 U.S.C. § 726(a)(6).

First, from a practical standpoint, it appears that the potential for Bogdan to make any personal recovery does not realistically exist. The trustee seeks to recover a total of $1.5 million in this adversary proceeding, all of which will become property of the estate available to pay claims against the estate. The trustee represents that the mortgage lenders have filed claims against the estate seeking most of this amount. Moreover, the trustee represents that at least $1.5 million in additional claims *unrelated* to the "flipping scheme" have also been filed by other creditors against the estate. Thus, any monies recovered in this proceeding would not likely satisfy

all the claims against Bogdan's estate, and there would be no surplus assets to distribute to Bogdan.

Second, in the unlikely event that any property of the estate will remain after all claims and legal and administrative fees of the estate have been satisfied, the alleged coconspirators could pursue other remedies to keep Bogdan from personally recovering as a result of his criminal conduct. For instance, the alleged coconspirators can attempt to raise the doctrine of *in pari delicto* against Bogdan personally at that stage of the bankruptcy case. Or, as some other courts have suggested, the alleged coconspirators could seek to assert subrogation claims against Bogdan. *Caplin*, 406 U.S. at 430; *Williams*, 859 F. 2d at 667.[2] Nevertheless, the remote chance that Bogdan might personally receive a distribution of estate property from his bankruptcy estate should not deter the more fundamental policy undergirding the bankruptcy system: allowing the trustee to maximize the value of the estate so that the claims against the debtor are paid to the fullest extent possible. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352, 355, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985). The trustee's adversary proceeding in this case is particularly appropriate because the trustee is seeking to maximize the value of the estate by attempting to collect money now owed to the estate -- by virtue of the assignment -- from the very individuals and entities that he claims wrongfully caused, at least in part, the losses sustained by Bogdan's creditors.[3]

---

[2] We do not decide that the alleged coconspirators could successfully assert these defenses. Instead, we state only that they can attempt to assert them.

[3] The dissent suggests that the bankruptcy and district courts merely exercised their discretion in invoking the equitable defense

V.

For the foregoing reasons, the judgment of the district court is reversed, and we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

KING, Circuit Judge, concurring in part and dissenting in part:

Although I am constrained to partially concur in the panel majority's decision, I write separately for two reasons. First, the majority's position on standing depends entirely on the legality of the assignments under Maryland law, and because the assignments were not presented to the lower courts, their validity remains subject to question. My partial concurrence is thus subject to this caveat, in that the assignments may well be invalid. Second, I disagree with the view of my friends in the majority that the trustee is not subject to the defense of *in pari delicto*.

I.

I first briefly address the issue of standing and the problem of the assignments. In *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972), the Supreme Court held that a reorganization

---

of *in pari delicto* and that we should not disturb these rulings. We cannot, however, affirm a lower court's ruling if it is based on erroneous legal principles. *See Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). In this case, both the bankruptcy and district court's rulings were based on a misapplication of *Caplin* or cases following *Caplin*.

bankruptcy trustee lacked standing to assert claims against third parties on behalf of the holders of the debtor's debentures. The Court premised its ruling on three bases: (1) the applicable bankruptcy statute failed to authorize the trustee to assert such claims; (2) the debenture holders, rather than the trustee, were obliged to decide whether to sue third parties; and (3) such claims asserted by the trustee may be inconsistent with independent actions pursued by debenture holders, enhancing the extent and complexity of the litigation. 406 U.S. at 428-34. In this proceeding, as the majority observes, the second and third *Caplin* factors bear no relationship to the claims asserted by the Bogdan trustee. The determinative question thus implicates the first *Caplin* factor only, that is, whether the Bankruptcy Code authorizes the claims asserted in the Bogdan trustee's adversary proceeding. *See Cissell v. Am. Home Assurance Co.*, 521 F.2d 790, 792 (6th Cir. 1975) ("As a creature of statute, the trustee in bankruptcy has only those powers conferred upon him by the Bankruptcy [Code].").

By § 704(1) of the Bankruptcy Code, a Chapter 7 trustee is authorized to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(1). Because claims of the debtor constitute property of a bankruptcy estate under § 541(a)(1) of the Code, § 704(1) grants the debtor's trustee the right to assert causes of action on behalf of the debtor. 11 U.S.C. §§ 541(a)(1), 704(1); *see Polis v. Getaways, Inc., (In re Polis)*, 217 F.3d 899, 901 (7th Cir. 2000) (noting that § 541(a) has "uniformly been interpreted to include causes of action"). If a claim belongs solely to the creditors, however, the debtor's trustee has no standing to pursue it. *Caplin*, 406 U.S. at 434. And whether a particular claim belongs to the debtor, thus constituting "property of the estate," depends upon state law. *Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 135 (4th Cir. 1988); *see also Official Comm.*

of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand,LLP, 322 F.3d 147, 156-57 (2d Cir. 2003) (holding that state law claims assigned to bankruptcy trustee belonged to debtor under Texas law and thus that trustee possessed standing).

Under Maryland law (which applies in this dispute), a cause of action arising in either contract or tort is generally considered to be an assignable claim. *See Med. Mut. Liab. Ins. Soc'y of Md. v. Evans*, 330 Md. 1, 622 A.2d 103, 116 (Md. 1993). The complaint filed by the Bogdan trustee alleges that the mortgage lenders have assigned to him state law claims of civil conspiracy, intentional misrepresentation, fraudulent concealment, negligence, and breach of contract. Because the trustee, as assignee, is the real party in interest under Maryland law, the causes of action alleged in the complaint constitute apparent claims of the debtor. *Bacon & Assocs., Inc. v. Rolly Tasker Sails (Thailand) Co.*, 154 Md. App. 617, 841 A.2d 53, 66 (Md. Ct. Spec. App. 2004) (holding that an "'assignment passes the title to the assignee so that *he is the owner* of any claim arising from the chose and should be treated as the real party in interest'") (emphasis added) (quoting 6A C.A. Wright, A.R. Miller, & M.K. Kane, *Federal Practice and Procedure: Civil 2d* § 1545, at 346 (1990)); *cf. Williams v. Cal. 1st Bank*, 859 F. 2d 664, 666 (9th Cir. 1988) (holding trustee lacked standing to bring suit on assigned claims in part because creditors remained "real party in interest").

This analysis, however, is predicated entirely on the assumed validity of the assignments, a proposition we accept in viewing the complaint in the light most favorable to the trustee. *See* Fed. R. Civ. P. 12(b)(6); *Lambeth v. Bd. of Comm'rs of Davidson County, N. C.*, 407 F. 3d 266, 268 (4th Cir. 2005) ("We accept as true the factual allegations of the

challenged complaint, and we view those allegations in the light most favorable to the plaintiff.") (internal citations omitted). As I see it, the assignments here are likely invalid under Maryland law, which precludes the assignment of claims if it contravenes public policy. *See, e.g., Pub. Serv. Comm'n of Md. v. Panda-Brandywine, LP*, 375 Md. 185, 825 A.2d 462, 469 (Md. 2003) (relying on Restatement (Second) §§ 317-23 (1981) of Contracts that assignments are valid unless inoperative on grounds of, *inter alia*, public policy). In this proceeding, the trustee for the estate of a tortfeasor is seeking to sue the debtor's joint tortfeasors. Put simply, one of several thieves, purportedly acting on behalf of his victims, is suing his fellow thieves. The stench arising from such a proceeding -- being pursued in a federal court of equity -- cannot be concealed by any amount of perfume. And, under Maryland law, the joint-tortfeasor defendants are entitled to counterclaim against the trustee for contribution, on both the trustee's contract and tort claims, if a judgment is rendered against them. *See* Md. Cts. & Jud. Proc. Code Ann. § 3-1402(a) (2004) ("The right of contribution exists among joint tort-feasors."); *see also Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs.*, 109 Md. App. 217, 674 A.2d 106, 137 (Md. Ct. Spec. App. 1996) ("Contribution is not limited to tort cases.").

The pursuit of this proceeding thus appears to impose on the Bogdan trustee an untenable conflict of interest, in contravention of Maryland's public policy. On the one hand, the trustee, as assignee, is suing the defendants for their tortious activities and, on the other, he must defend the debtor, admittedly a joint tortfeasor in those same illegal activities. *See* Md. R. Prof. Conduct 1.7, Conflict of Interest (barring attorney from representing clients if that representation will be materially limited by lawyer's

responsibilities to another client or to third person).[1] Because -- and only because -- the bankruptcy and district courts have not had occasion to address the potential invalidity of the assignments, I concur in the standing aspect of the panel decision. As I see it, however, the assignments are probably invalid under Maryland law.

II.

Turning to the issue of the *in pari delicto* defense, I disagree with the panel majority that the Bogdan trustee, as assignee of the claims, is *only* subject to defenses which the defendants could have raised against the mortgage lenders. The decisions upon which the majority relies on this issue, *James v. Goldberg*, 256 Md. 520, 261 A.2d 753 (Md. 1970), and *Harris v. Max Kohner, Inc.*, 230 Md. 349, 187 A.2d 97 (Md. 1963), are inapposite -- they stand for the mere

---

[1] In addition to the conflict of interest problems facing the Bogdan trustee, other public policy concerns are apparent. For example, some state courts have held that it is against public policy to permit a joint tortfeasor to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributed. *See, e.g., Int'l Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934, 31 Tex. Sup. Ct. J. 227 (Tex. 1988); *see also BHI Corp. v. Litgen Concrete Cutting & Coring Co.*, 214 Ill. 2d 356, 827 N.E.2d 435, 438-39, 292 Ill. Dec. 906 (Ill. 2005) (holding assignment of tort claims to settling defendants contravened public policy of Illinois' contribution scheme); *DeJong v. B.F. Goodrich, Inc.*, 96 Mich. App. 36, 292 N.W.2d 157, 159-60 (Mich. Ct. App. 1980) (holding assignment of wrongful death action to insurer of tortfeasor violated public policy); *Coleman Powermate, Inc. v. Rheem Mfg. Co.*, 880 So. 2d 329, 335 (Miss. 2004) ("No jurisdiction has yet authorized one tortfeasor to bring an action against a joint tortfeasor as assignee of the wrongful death beneficiaries.").

proposition that equitable defenses which the defendants possess against the assignor may likewise be raised against the assignee. *See James*, 261 A.2d at 757 ("An unqualified assignment generally operates to transfer to the assignee all of the right, title and interest of the assignor in the subject of the assignment and does not confer upon the assignee any greater right than the right possessed by the assignor."); *Harris*, 187 A.2d at 100 ("[A] trustee for creditors stands in the shoes of his assignor and takes the property subject to all equities against the assignor.") (internal quotation marks omitted). Although a trustee may stand in the shoes of creditors, the *James* and *Harris* decisions do not support the proposition that the defendants are precluded from raising validly held defenses against the Bogdan trustee.

Furthermore, the defense of *in pari delicto* is an equitable doctrine, and under Maryland's formulation of that defense, the courts are to be concerned with "'the policy of the law.'" *Schneider v. Schneider*, 335 Md. 500, 644 A.2d 510, 517 (Md. 1994) (quoting *Cronin v. Hebditch*, 195 Md. 607, 619-20, 74 A.2d 50 (Md. 1950)); *see also* Tanvir Alam, *Fraudulent Advisors Exploit Confusion in the Bankruptcy Code: How In Pari Delicto Has Been Perverted to Prevent Recovery for Innocent Creditors*, 77 Am. Bankr. L.J. 305, 315 (2003)("In pari delicto is a highly flexible equitable doctrine easily adoptable to peculiar fact scenarios and crucially concerned with fair outcomes."). Indeed, a court may strike the defense of *in pari delicto* "if the equities call for such a limitation," but the "court may exercise 'the [furthest] breadth of its discretion'" in determining its applicability. *Brown & Sturm v. Frederick Road Ltd. P'ship*, 137 Md. App. 150, 768 A.2d 62, 89 (Md. Ct. Spec. App. 2001) (quoting *Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman, & Tuerk, LLP*, 122 Md. App. 29, 712 A.2d 1, 8 (Md. Ct. Spec. App. 1998)). Here, both the bankruptcy and

district courts have properly exercised their discretion in that regard, and each has concluded that the trustee is subject to the *in pari delicto* defense in this proceeding. *See Logan v. JKV Real Estate Servs., Inc. (In re Inner City Mgmnt., LLC)*, 2004 U.S. Dist. LEXIS 7923, No. Civ. AMD 04-438, slip op. at *7 (D. Md. May 5, 2004); *Logan v. Kramer, (In re Inner City Mgmnt., LLC)*, 304 B.R. 250, 254 (Bankr. D. Md. Oct. 7, 2003).[2] In my view, these rulings are not erroneous, and I therefore agree with these courts that the trustee is subject to the *in pari delicto* defense. *Logan*, No. Civ. AMD 04-438, slip op. at *7; *Logan*, 304 BR. at 254.

Pursuant to the foregoing, I concur in part and dissent in part.

---

[2] One final point: as I see it, the lower courts incorrectly conflated the applicability of the *in pari delicto* defense with the issue of standing. The standing question is properly a separate issue from whether the defense of *in pari delicto* applies. *See Official Comm. of Unsecured Creditors v. R.F. Leftward & Co.*, 267 F. 3d 340, 346 (3rd Cir. 2001) ("An analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*. Whether a party has standing to bring claims and whether a party's claims are barred by an equitable defense are two separate questions, to be addressed on their own terms.").

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. AMD 04-438

[Filed May 5, 2004]

In Re: INNER CITY MANAGEMENT, LLC,	)
MICHAEL BOGDAN,	)
Debtors	)
--	)
SEAN C. LOGAN, TRUSTEE,	)
Appellant,	)
	)
v.	)
	)
JKV REAL ESTATE SERVICES, INC., et al.,	)
Appellees.	)
	)

APPEAL FROM BANKRUPTCY
CASE NO. 00-60732-JS

ANDRE M. DAVIS, United States District Judge

MEMORANDUM OPINION

This is an appeal from an order of the bankruptcy court. *See Logan v. Becker (In re Inner City Mgmt., Inc.),* 304 B.R. 250 (Bankr. D. Md. 2003). Michael Bogdan and Inner City

Management, LLC, debtors, filed voluntary Chapter 7 bankruptcy petitions on August 25, 2000. Appellant Sean C. Logan, the Trustee, seeks review of the bankruptcy court's dismissal of an amended complaint in an adversary proceeding. The issues have been fully briefed and oral argument is not needed. The order of the bankruptcy court shall be affirmed.

I.

On June 25, 2002, the Trustee filed a ten-count complaint against 46 defendants including appellees, JKV Real Estate Services, Inc., John K. Voyatzis, Stewart Title Guarantee Company, and Fidelity National Title Insurance Company, alleging breach of contract, fraud, civil conspiracy, and negligence. *Id.* at 252. The Trustee sought damages. arising out of a fraud scheme to obtain mortgage loans. The bankruptcy court dismissed the initial complaint, largely on the ground of misjoinder, granting leave to file separate complaints against the various defendants. Thereafter, the Trustee filed amended complaints, one of which is the subject of this appeal.

The amended complaint against the appellees alleged, among other things, that debtor Bogdan participated with appellees in the scheme to obtain loans for the purchase of real property in Baltimore City, by submitting false and fraudulent documentation, e.g., inflated appraisals, as part of the loan applications, with the purpose of engaging in illegal "flipping" of real property. As a result of the scheme, mortgage lenders made loans secured by rental properties worth far less than the mortgage securing the property. *Id.* The real estate settlement agents involved in the scheme, including one of the appellees, disbursed the loan proceeds for the purchased properties contrary to the mortgage lenders'

instructions, allowing the participants to receive substantial cash from the proceeds of the mortgage loans. *Id.*

The bankruptcy court dismissed the amended complaints. It held, citing numerous cases, that the Trustee lacked standing to sue the appellees, both because the ostensible claims belonged to the victim lenders, and also because the Trustee was precluded by the doctrine of *in pari delicto*. *Id.* at 254. (Indeed, Bogdan pled guilty in this court to charges arising out of the scheme.) Furthermore, the bankruptcy court held that the formal *assignment* to the Trustee of specific claims against the debtors by the mortgage lenders and/or the purchasers of the mortgages was insufficient to provide standing to the Trustee. *Id.* ("To grant such standing not specifically authorized by the Bankruptcy Code would unlawfully expand the traditional powers of bankruptcy trustees and defeat the statutory scheme created by Congress."). The Trustee has appealed.

II.

Appellee Fidelity National Title Insurance Company has moved to dismiss the appeal as untimely. Under Bankruptcy Rule 8002, a notice of appeal shall be filed with the clerk within ten days of the date of entry of the judgment, order, or decree appealed from; otherwise, this court lacks jurisdiction to hear the appeal. *Souza v. United States*, 795 F.2d 855, 857 (9th Cir. 1986). Fidelity's motion requires that I determine the date on which the bankruptcy court's order was in fact entered.

As noted above, the Trustee initially filed a single complaint against numerous defendants, including Fidelity. After dismissing the complaint, the bankruptcy court allowed the Trustee to file five separate amended complaints, all of

which related back to the date of the original complaint. The clerk assigned separate adversary proceeding numbers to each of the amended complaints and established separate dockets for each. However, the bankruptcy court treated the adversary proceedings as part of a consolidated proceeding. It issued a single memorandum opinion granting the motions to dismiss with respect to the five amended complaints.

The timeliness issue presented here arose when, on October 7, 2003, the clerk docketed the court's order in only four of the proceedings. The fifth order, relating to the amended complaint in this case, was not filed until December 2, 2003, although the clerk docketed the date of entry as October 7, 2003. Fidelity contends that the present appeal, noted on December 12, 2003, is untimely because it was not filed until four months after the date of entry.

Fidelity's challenge is without merit. Although marked with the October 7, 2003, date, the order at issue was not in fact entered until December 2, 2003; thus, the December 12, 2003, notice of appeal was timely. The fact that the court's order was issued in October does not change this result. Federal Rule of Bankruptcy Procedure 9021 applies Federal Rule of Civil Procedure 58 to bankruptcy cases and states, "Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document." "Entry" is defined as occurring "only when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of the separate document is reflected in an appropriate notation on the docket sheet. . ." *Capteron v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 688 (4th Cir. 1978) (identifying the entry of judgment requirements of Fed. R. Civ. P. 58). The entry of judgment in this case did not take place until the order at issue was entered in December

2003. Accordingly, the appeal is timely and properly before this court.

III.

I now turn to address the merits of the Trustee's appeal. Section 158 of Title 28 of the United State Code authorizes United States District Courts to act as appellate tribunals for final orders from bankruptcy courts. 28 U.S.C. § 158. On appeal, district courts review bankruptcy courts' factual findings for clear error, and their conclusions of law under the de novo standard. *In re Kielisch,* 258 F.3d 315, 319 (4th Cir. 2001); *In re Deutchman,* 192 F.3d 457, 459 (4th Cir. 1999).

The Trustee disputes the bankruptcy court's determination that it lacked standing to pursue the assigned claims. It is undisputed that a bankruptcy trustee has limited standing, namely, that the trustee enjoys standing to assert only causes of action belonging to the debtor at the commencement of the bankruptcy case. *In re Ozark Restaurant Equipment Co., Inc,* 816 F.2d 1222, 1225 (8th Cir. 1987), *cert. denied,* 484 U.S. 848 (1987). A trustee does not have standing to assert claims on behalf of creditors or third parties. *Caplin v. Marine Midland Grace Trust, Co.,* 406 U.S. 416, 417, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972)(decided under the former Bankruptcy Act); *Williams v. California 1st Bank,* 859 F.2d 664, 666 (9th Cir. 1988). In *Caplin,* the Supreme Court held that a bankruptcy trustee lacked standing to assert claims on behalf of debenture purchasers against an indenture trustee who allegedly violated its undertakings in managing the debtor's debentures. The Court articulated three reasons for its decision: (1) no provision in the Bankruptcy Act enabled the trustee to collect money not owed to the estate, 406 U.S. at 428; (2) the debtor had no claim against the indenture

trustee and at most the allegation described a situation where the debtor was *in pari delicto* with the indenture trustee, *id.* at 429-30; and (3) the trustee's suit on behalf of the debenture holders could be "inconsistent with any independent actions [the debenture holders] might bring themselves." *Id.* at 431-32.

The *Caplin* holding was applied to a case like the one here, where the third party *assigned* its claim to the trustee, in *Williams,* 859 F.2d at 666-667. The Ninth Circuit noted that "the assignments notwithstanding, the investors plainly remain the real parties in interest in the transactions." *Id.* at 666. The court found that the trustee had no claim of its own that it could press against the defendant and that the debtor may have stood *in pari delicto* with the third party. *Id.* at 667. In reaching its decision, the court relied in large part on Congress's express decision not to overrule *Caplin* in rewriting the bankruptcy laws. Id.

In this case, the Trustee attempts to distinguish *Williams* on the basis that the *William's* trustee took only a *limited* assignment from certain creditors and reserved all recoveries over and above the costs of the suit for the assigning creditors. Instead, the Trustee would rely on *Finova Capital Corp. v. Lawrence,* 2000 U.S. Dist. LEXIS 17990, No. CIV. A. 3-99-CV-2552-M, 2000 WL 1808276 (N.D. Tex. December 8, 2000), in which the court allowed a trustee to be substituted for a creditor as to claims asserted in district court by the creditor against the debtor's corporate officers and directors. The trustee was conditionally assigned the claims as part of its settlement of claims of the creditors against the debtor. 2000 U.S. Dist. LEXIS 17990, [WL] at *2. After the assignment, the creditor and the trustee filed a motion to substitute the trustee as plaintiff in the case against the officers and directors of the debtor for failing to preserve the

company's assets for the creditors. The magistrate judge rejected the objections for lack of standing and allowed the creditor and the trustee jointly to pursue the case.

The Trustee's reliance on *Finova's*, 2000 U.S. Dist. LEXIS 17990 narrow holding is misplaced. *Finova*, 2000 U.S. Dist. LEXIS 17990, merely found that, outside of the bankruptcy context, a bankruptcy trustee may pursue claims that are assigned to the trustee to settle the creditor's claims against the debtor, under circumstances (outside of the bankruptcy context) in which there is no suggestion that the debtor was *in pari delicto* with the proposed defendants, there the officers and directors of the debtor. Application of this narrow holding here would not avoid the Supreme Court's reasoning in *Caplin*. This case, like *Williams*, is governed by *Caplin*. Thus, the bankruptcy court correctly held that the Trustee lacks standing to pursue the lenders' claims against the appellees, notwithstanding the formal assignment of the claims to the Trustee.

IV.

For the reasons stated above, the order appealed from shall be affirmed. An order follows.

Filed: May 5, 2004

/s/ ____________________
ANDRE M. DAVIS
United States District Judge

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 5th day of May, 2004, ORDERED

(1) That the order of the bankruptcy court is AFFIRMED; and it is further ORDERED

(2) That the Clerk shall CLOSE THIS CASE and TRANSMIT a copy of this Order and the foregoing Memorandum Opinion to the Clerk of the United States Bankruptcy Court for this district.

/s/______________________
ANDRE M. DAVIS
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

Case No. 00-6-0731-JS (Chapter 7), Case No. 00-6-0732-JS (Chapter 7), Adv. Pro. No. 02-5681-JS, Adv. Pro. No. 03-5069-JS, Adv. Pro. No. 03-5070-JS, Adv. Pro. No. 03-5071-JS, Adv. Pro. No. 03-5072-JS

[Filed October 7, 2003]

In re: INNER CITY MANAGEMENT,)
INC.,)
Debtor;)
)
In re: MICHAEL BOGDAN,)
Debtor;)
--)
SEAN C. LOGAN, Chapter 7 Trustee,)
Plaintiff)
)
v.)
)
IRVIN L. BECKER, JR.,)
Defendant;)
--)
SEAN C. LOGAN, Chapter 7 Trustee,)
Plaintiff)
)
v.)

GILBERT KRAMER, Et al.,)
Defendants;)
--)
SEAN C. LOGAN, Chapter 7 Trustee,)
Plaintiff)
)
v.)
)
JOHN VOYATZIS, Et al.,)
Defendants;)
--)
SEAN C. LOGAN, Chapter 7 Trustee,)
Plaintiff)
)
v.)
)
NORMAN C. ANDERSON, Et al.,)
Defendants;)
--)
SEAN C. LOGAN, Chapter 7 Trustee,)
Plaintiff)
)
v.)
)
NICHOLAS PISTOLAS, Et al.,)
Defendants)
____)

JAMES F. SCHNEIDER, U. S. BANKRUPTCY JUDGE

MEMORANDUM OPINION GRANTING DEFENDANTS' MOTIONS TO DISMISS AMENDED COMPLAINTS

These consolidated adversary proceedings are before this Court upon various motions to dismiss. The issue presented by the motions is whether the Chapter 7 trustee has standing to assert a fraud claim on behalf of the bankruptcy estate against third parties with whom the debtor was engaged in wrongdoing. For the reasons stated, the motions to dismiss will be granted.

FINDINGS OF FACT

On August 25, 2000, the debtors, Michael Bogdan ("Bogdan") and Inner City Management ("Inner City") filed voluntary Chapter 7 bankruptcy petitions in this Court. Sean C. Logan was appointed Chapter 7 trustee. On June 25, 2002, the trustee filed a ten-count complaint against 46 defendants, including Fidelity National Title Insurance Company, JKV Real Estate Services, John K. Voyatzis, Statewide Title Company, American Title Insurance Company, Gilbert Kramer, First American Title Insurance, Reliance Insurance Co., Stewart Title Guaranty Co., Nicholas Pistolas, All County Title, Security Title Guarantee, and American Security Mortgage alleging breach of contract, fraud, civil conspiracy, and negligence. The defendants filed motions to dismiss on grounds, *inter alia*, that the trustee failed to plead fraud with particularity as to each named defendant and that the trustee lacked standing to pursue a claim on behalf of creditors of the estate.

At a hearing on November 19, 2002, this Court granted the motions to dismiss on the ground that the trustee could not join all of the defendants in one complaint based upon separate causes of action arising out of different facts. In so doing, the Court also held that the plaintiff had failed to allege fraud against each defendant with sufficient particularity. On November 25, 2002, this Court entered an order that

dismissed the complaint with leave to file separate complaints against the various defendants within 60 days. Accordingly, on January 17, 2003, the trustee filed the instant complaints.

The five complaints alleged that Bogdan was sole shareholder and alter ego of Inner City. Beginning in 1997, Bogdan conspired with the defendants in an illegal "flipping scheme," obtaining loans to purchase real property in the city of Baltimore by submitting false and fraudulent documentation as part of their loan applications and selling the properties at inflated prices based upon false appraisals. These appraisals were used by the defendant mortgage brokers to justify the issuance of mortgages for amounts greatly in excess of the value of the properties. Settlement agents disbursed loan proceeds that allowed buyers to receive substantial kickbacks from the proceeds of the mortgage loan. This fraudulent and illegal conspiracy continued until Bogdan was charged in Federal district court with conspiracy to commit mail and wire fraud and with making false statements in violation of 18 U.S.C. § 371. On December 19, 2000, he entered a guilty plea to the charges.

CONCLUSIONS OF LAW

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6), made applicable to these bankruptcy proceedings by Fed. R. Bankr. P. 7012(b), provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except

> that the following defenses may at the option of the pleader be made by motion. . .
>
> (6) failure to state a claim upon which relief can be granted.

Id.

The standard applicable to a motion to dismiss is well established. When ruling on a Rule 12(b)(6) motion, the court accepts as true all well-pleaded allegations in the complaint, including all reasonable inferences that may be drawn from them, in the light most favorable to the plaintiff. *Hemelt v. Pontier (In re Pontier)*, 165 B.R. 797, 798-99 (Bankr. D. Md. 1994). "[A] complaint should not be dismissed merely because the court doubts that the plaintiff will ultimately prevail; so long as a plaintiff colorably states facts which, if proven, would entitle him to relief, the motion to dismiss should not be granted." *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 145 n.8 (4th Cir. 1990); *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982).

CONSTITUTIONAL REQUIREMENTS OF STANDING

Article III of the Constitution confers upon the federal courts the judicial power to adjudicate cases or controversies. U.S. Const. art. III, § 2, cl. 1; *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984); *In re A.R. Baron & Co.*, 280 B.R. 794, 799 (Bankr. S.D.N.Y. 2002). The Article III doctrine requires that a litigant have standing to invoke the power of a Federal court. *Allen*, 468 U.S. at 740, 104 S.Ct. at 3324, 83 L.Ed 2d 556; *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1091(2d

Cir. 1995). In order to have standing, "[a] party must 'assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interest of third parties.'" *Shearson-Lehman Hutton, Inc. v, Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) *(quoting Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L. Ed. 2d 343 (1975)). Unless the party has a "personal stake in the outcome of the controversy, the action does not meet the case or controversy requirement of the constitution." *Warth*, 422 U.S. at 498-99, 95 S. Ct. at 2205, 45 L. Ed. 2d 343 (*quoting Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962)). Accordingly, a plaintiff must "[1] allege personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief." *In re Hirsch*, 72 F.3d at 1090 (*quoting Allen*, 468 U.S. at 751, 104 S.Ct. at 3324, 82 L.Ed. 2d 556))(internal citations omitted).

THE TRUSTEE'S LACK OF STANDING

"The trustee succeeds to the property of the debtor's estate," *Drabkin v. L & L Constr. Assocs. (In re Latin Inv. Corp.)*, 168 B.R. 1, 4 (Bankr. D.D.C. 1993, "[which] includes all causes of action the debtor could have brought outside bankruptcy." *Id.* Thus, the bankruptcy trustee lacks standing to sue on behalf of the bankruptcy estate against nondebtor third parties unless the claims being sued on were those of the debtor. *Tese-Milner v. Beeler (In re Hampton Hotel Investors, L.P.)*, 289 B.R. 563, 574 (Bankr. S.D.N.Y. 2003).

To have standing to pursue a claim against nondebtor third parties, the trustee must allege that the debtor was harmed in a manner that is distinct form the harm suffered by the estate's creditors. "When creditors have. . . a claim for injury

that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so." *Hirsch,* 72 F.3d at 1093. "Where claims belong solely to the creditors and involve misconduct on the part of the debtor against creditors, *i.e.*, 'when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors.'" *Lippe v. Bairnco Corp. (In re Lippe),* 218 B.R. 294, 301 (S.D.N.Y. 1998), *quoting Wagoner,* 944 F.2d at 118.

The trustee also lacks standing under the doctrine of *in pari delicto*, according to which a debtor who was complicit in wrongdoing with third parties is precluded from pursuing a claim against a nondebtor third party. "When a [debtor] has joined with a third party in defrauding creditors, the trustee cannot recover against the third party for the damage to the creditors." *A.R. Baron,* 280 B.R. at 800; *Wagoner*, 944 F.2d at 118.

In the instant complaints for damages to creditors caused by the fraudulent conduct of the debtor and the entities under his control, the trustee lacks standing to sue the defendants for injuries they caused in concert with the debtor. The cause of action belongs exclusively to the injured creditors of the bankruptcy estate and not to the debtor's estate, because absent the bankruptcy case, the debtor had no standing to sue the defendants. Because the instant suit is not premised upon injury to the estate, the trustee is not the proper plaintiff to bring suit. *National City Bank of Minneapolis v. Lapides, (In re Transcolor)*, 296 B.R. 343, 367 (Bankr. D. Md. 2003).

This result is not altered by the assignment to the trustee of specific claims against the debtors by various mortgage lenders and/or purchasers of mortgages who were injured by

the debtors' fraudulent conduct. The trustee has no derivative standing to sue debtors based on the claims of individual creditors, whether by assignment or otherwise. To grant such standing not specifically authorized by the Bankruptcy Code would unlawfully expand the traditional powers of bankruptcy trustees and defeat the statutory scheme created by Congress.

This is a vastly different scenario from that presented in *Transcolor,* 296 B.R. 343, decided by this Court earlier this year. In *Transcolor,* the suit was brought by a creditor against a debtor and its alter ego for damages the plaintiff sustained by reason of the fraud of the debtor and the alter ego. While the trustee acknowledged the plaintiff's standing to sue, (and implicitly her own lack thereof), the plaintiff agreed to share any recovery of damages with the debtor's estate.

In the instant complaints, the trustee had no standing in the first place and did not acquire standing by his acceptance of the injured creditors' assignments of claims.

WHEREFORE, the motions to dismiss will be GRANTED, based upon the trustee's lack of standing to bring and maintain the instant complaints.

ORDER ACCORDINGLY.

SO ORDERED

Dated October 07, 2003

ORDER DISMISSING COMPLAINTS WITH PREJUDICE

Based upon the memorandum opinion filed simultaneously herein, the defendants' motions to dismiss the instant complaints are hereby GRANTED, and the instant complaints are hereby DISMISSED WITH PREJUDICE.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 3. CASE ADMINISTRATION
SUBCHAPTER 11. OFFICERS

§ 323. Role and capacity of trustee

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2562

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5--CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER III--THE ESTATE

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have

been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5--CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER III--THE ESTATE

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

Current through P.L. 109-90 approved 10-18-05

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 7--LIQUIDATION
SUBCHAPTER I--OFFICERS AND ADMINISTRATION

§ 704. Duties of trustee

The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with

responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 7--LIQUIDATION
SUBCHAPTER II--COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

§ 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed--

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is--

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if--

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7), or (8) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1009,[1] 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular

---

[1] So in original. This title does not contain a section 1009.

paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

Current through P.L. 108-198, approved 12-19-03

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I--ORGANIZATION OF COURTS
CHAPTER 6--BANKRUPTCY JUDGES

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final

order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Current through P.L. 109-90 approved 10-18-05